IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. EDWARD LOPEZ DE LA CRUZ, Petitioner.	2 CA-CR 2007-0100-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20022853

Honorable Jan E. Kearney, Judge

REVIEW GRANTED; RELIEF DENIED

Meredith Little — Tucson
Attorney for Petitioner

H O W A R D, Presiding Judge.

¶1 Following a jury trial conducted in his absence, petitioner Edward Lopez de la Cruz was convicted of aggravated assault with a deadly weapon or dangerous instrument committed on a peace officer, a dangerous offense. The trial court sentenced him to an enhanced, presumptive term of 15.75 years in prison. We affirmed his convictions and sentences on appeal. *State v. de la Cruz*, No. 2 CA-CR 2004-0229 (memorandum decision filed Nov. 23, 2005).

¶2 De la Cruz then filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. In the petition that followed, de la Cruz contended his trial counsel had rendered ineffective assistance "because: A) he failed to challenge an inaccurate diagram of the location of the incident, confusing a key defense witness; B) he failed to interview and call potential defense witnesses; and C) he failed to effectively cross-examine the State's only witness." The trial court held an evidentiary hearing on de la Cruz's claims and denied relief, giving rise to the present petition for review. We review a trial court's grant or denial of post-conviction relief for an abuse of discretion, *see State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find none here.

Background

¶3 At trial, a Tucson police officer testified that, on September 11, 2002, while assigned to provide motorcycle traffic enforcement, he had volunteered to assist other officers by attempting to locate witnesses to an incident that had been reported. On direct examination, he testified to the following encounter with de la Cruz that afternoon.

¶4 The officer saw de la Cruz walking alone on a residential street. Approaching him from behind, the officer slowed his police motorcycle to determine if de la Cruz resembled any of the subjects of his investigation. De la Cruz turned as the officer drew near, made eye contact, smiled broadly, and pulled a knife from behind his back, deftly flipping it in the air and catching it again "in some type of professional fashion." De la Cruz continued to stare and smile and began to gesture with the knife, without pointing it directly at the officer, while still walking straight ahead.

¶5 The officer accelerated his motorcycle to increase the distance between the two men and executed a 180-degree turn at an intersection thirty feet in front of de la Cruz. After stopping his motorcycle in the intersection, he saw that de la Cruz had altered his direction and was now advancing toward him, still wielding the knife. The officer dismounted, drew his firearm, pointed it directly at de la Cruz, and commanded him to "stop" and "drop the knife." De la Cruz instead replaced the knife in the back waistband of his pants and kept advancing. The officer continued to shout commands, and de la Cruz continued to advance, with his hands at his side, until he was approximately fifteen feet away. De la Cruz then abruptly turned away from the officer and resumed his previous course. The officer circled around in front of de la Cruz and apprehended him. After de la Cruz slowly obeyed the officer's command to "get down on the ground," the officer disarmed and handcuffed him.

¶6 The officer told the jury he had been trained to understand that someone with a knife poses a lethal threat at a distance of twenty-one feet or less. Based on that training, he had feared de la Cruz would seriously injure him by charging him with the knife or throwing it.

¶7 At the end of the first day of trial, de la Cruz's counsel briefly cross-examined the officer about the chronology of events and discrepancies between his testimony and his written report. For example, during cross-examination, the officer testified that de la Cruz had returned the knife to his waistband before the officer had drawn his gun, not after, at a time when the two were approximately twenty-five feet apart.

¶8 The next morning of trial, de la Cruz's counsel informed the court that two young witnesses who had been subpoenaed had not yet appeared. The court continued the trial for several hours; when trial resumed that afternoon, the two boys, aged eleven and eight, were present. Both children testified that they had been outside playing and, from a yard across the street, had witnessed the events leading to de la Cruz's arrest. They said they had seen de la Cruz holding what looked like a knife as he walked down the street with his hands at his side but had not seen him flip it in the air or brandish it. They testified that de la Cruz had dropped the knife and had slowly assumed a prone position after the officer had ordered him to do so.

¶9 In response to a question from a juror, the court asked one of the children to describe where his house would be on a map drawn by the officer and admitted as an exhibit. The witness said he was confused by the map because the location of a main cross-street had been drawn incorrectly. The state then asked to follow up on the court's questions and drew a second map, also admitted as an exhibit, in which the streets were properly oriented. The child witness then used the new exhibit to clarify his testimony.

Discussion

¶10 To establish a claim of ineffective assistance of counsel, a defendant must show both that (1) counsel's performance was objectively unreasonable under prevailing professional standards and (2) counsel's deficient performance so prejudiced the defense that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S.

668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *State v. Nash*, 143 Ariz. 392, 397-98, 694 P.2d 222, 227-28 (1985). If a defendant fails to establish one required prong of this test, the court need not address the other. *State v. Rosas*, 183 Ariz. 421, 422, 904 P.2d 1245, 1246 (App. 1995). We "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Thus, "[d]isagreements in trial strategy will not support a claim of ineffective assistance so long as the challenged conduct has some reasoned basis." *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985).

Evidentiary Hearing

¶11 In his petition for post-conviction relief, de la Cruz first claimed counsel was ineffective in failing to point out that the officer's diagram of the scene was inaccurate. According to de la Cruz, this failure prejudiced him because the erroneous map caused the child witness to become confused, thereby diminishing the witness's credibility in the eyes of the jury. Trial counsel acknowledged at the evidentiary hearing that he had not immediately noticed that the officer had transposed the location of streets in the diagram he drew at trial but that the error had come to counsel's attention after "one of the child witnesses corrected [the officer] on that." No further evidence was presented on this claim.

¶12 De la Cruz's next allegation of ineffectiveness involved trial counsel's alleged failure to "interview and call potential defense witnesses." These potential witnesses included the two child witnesses who did appear at trial; de la Cruz's former counsel who, according to de la Cruz, could have testified about his "impressions of the boys' perception,

memory, and truthfulness";[1] police officers to "provide [de la Cruz's] version of the facts"; and unnamed experts who might have rebutted the officer's testimony about the danger posed by someone armed with a knife, de la Cruz's ability to toss the knife and catch it in a "ready position," and the officer's inability to draw his gun while his motorcycle was moving.

¶13 De la Cruz's trial counsel gave the following reason for not personally interviewing the child witnesses before trial:

> It was my understanding that they had met at least two times with representatives of the Public Defender's office. Anything further than that, frankly, begins to look as though you are trying to structure the testimony of the witness[es], tell them what to say.

When asked again on cross-examination why he had not interviewed the children prior to trial, counsel responded:

> Because I had their statements [from former counsel]. I knew what they were going to say, and I wasn't about to taint them by having the prosecution ask, "How many times have you met with members of the defense team?", and have that in front of the jury. Because it's certainly possible that the State, then, could have made the argument that the children had been influenced by all the number of times that they had had members of the defense team talk to them about the case.

[1]De la Cruz was originally represented by the Pima County Public Defender's Office. The children were first interviewed by the assistant public defender initially assigned to de la Cruz's case or an investigator from his office. At some point in the proceedings, a privately employed attorney was substituted for the public defender and represented de la Cruz at trial. De la Cruz contends only that his trial counsel was ineffective and does not challenge the pre-trial representation by the public defender's office.

De la Cruz's allegation that counsel had not "called" the child witnesses to testify or that they could not be found was flatly disputed by trial counsel, who stated, "The two witnesses [who] testified at trial obviously were found, subpoenaed, and appeared."

¶14 With respect to trial counsel's reasons for not calling other witnesses, he testified that, in his legal opinion, testimony vouching for the credibility of de la Cruz or the child witnesses would not have been admissible. Similarly, he stated that testimony by police officers about what de la Cruz told them after his arrest would have been inadmissible hearsay. As for de la Cruz's suggestion that counsel had been ineffective in not consulting with experts, he stated he did not believe any expert testimony would have been effective in rebutting the officer's testimony.[2]

¶15 De la Cruz's final allegation below was that counsel had failed to effectively represent him when cross-examining the officer. Counsel had chosen to cross-examine the officer at the close of the first day of trial rather than on the following morning and gave the following explanation of his strategy at the evidentiary hearing:

> I had a brief and to the point cross-examination . . . . [F]rankly, as a matter of trial strategy, it was in my opinion the best way to get [the officer] off the stand with the least amount of damage to Mr. De La Cruz's case. I, therefore, asked the questions I could make headway on with [the officer]. As I recall, I made some headway and got him off the stand. . . . You frequently

[2]For example, trial counsel stated that he did not seek expert testimony about whether a person with a knife can cause lethal injury within a distance of twenty-one feet because any inaccuracy in the officer's training would not have been relevant to the officer's belief that he was in danger. Section 13-1203(A)(2), A.R.S., does not require that an assault victim be placed in actual danger; rather, assault is established by proof that a victim was intentionally placed in "reasonable apprehension of imminent physical injury."

> don't want to let the jury have nothing else to think about overnight than a strong State's witness . . . . You prefer to close with your cross-examination so the last thing that a jury has to think about is some doubt about the witness's testimony.

¶16 At the close of the evidentiary hearing, the trial court addressed de la Cruz's claims in detail and concluded that, as to each of them, de la Cruz had failed to establish either the incompetence of counsel or the prejudice required by *Strickland*.

Petition for Review

¶17 De la Cruz has petitioned for review of the following determinations by the trial court: (1) that trial counsel's failure to challenge the officer's mistaken diagram did not result in prejudice; (2) that trial counsel's decision to forego pretrial interviews with the child witnesses had a considered, tactical basis and was therefore not objectively unreasonable; and (3) that trial counsel's alleged failure "to interview or call" the child witnesses who did, in fact, testify at trial did not prejudice de la Cruz.

Failure to Challenge Erroneous Diagram

¶18 De la Cruz makes the same argument on review that he made below, verbatim, contending that,

> [t]o the jury . . . it appeared that the adults were the ones who knew what they were doing and that [the child witness] was too young, confused, and unsophisticated to be able to orient himself on a map of his own neighborhood. The implication was that [the child witness] could not accurately recount the details of what he witnessed on September 11, 2002.

In ruling from the bench after the evidentiary hearing, the court viewed things differently, commenting:

> The officer [drew] a handwritten diagram, and it had . . . two street names that were not properly entered into it. But the problem with the diagram was pointed out by the witness. And the boy might have prefaced his remarks by saying, "I'm confused," but he was very clear about what the streets should be. And as a result of his testimony the State came back and corrected the map.
>
> So as somebody who was sitting here during the trial, I will tell you that one inference that could be drawn from this whole series of events is that the boy's credibility was enhanced rather than [diminished] . . . . So the map situation and all of the related issues, in my view, [do] not display the potential for any prejudice and so, therefore, [do not] provide a reason for relief in this case.

We find no abuse of discretion in the trial court's determination that de la Cruz failed to establish a "'reasonable probability'" that he would have been acquitted if his attorney had immediately challenged the officer's drawing. *Nash*, 143 Ariz. at 398, 694 P.2d at 228, *quoting Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

The Child Witnesses

¶19 The trial court found that counsel's decision not to reinterview the child witnesses had been a tactical one, made on a reasoned basis, and that it therefore did not constitute ineffective assistance of counsel. *See Gerlaugh*, 144 Ariz. at 455, 698 P.2d at 700. As the trial court explained:

> With respect to counsel's failure to re-interview the already-twice-interviewed, juvenile witnesses, this was clearly a tactical matter for reasons . . . that are well known to anybody involved in criminal work, especially when you're talking about juvenile witnesses. There is a distinct hazard that multiple interviews will produce a weakened perception of the witness's credibility on the part of the jury. So I find that that's a tactical matter. And the law is pretty clear that the—where tactical

> decisions are concerned, the Court takes a pretty deferential view.

¶20 In rendering its decision, the trial court implicitly found that counsel's conduct fell "'within the wide range of reasonable professional assistance'" that is acceptable under *Strickland* and *Nash*. *Nash*, 143 Ariz. at 398, 694 P.2d at 228, *quoting Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. These findings are supported by the record and are not clearly erroneous. *See State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995) (findings after evidentiary hearing reviewed for clear error); *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000) ("We defer to the trial court's factual findings that are supported by the record and not clearly erroneous.").

¶21 Nevertheless, according to de la Cruz, the trial court abused its discretion because "the interviews by [former counsel] and his investigator were not recorded and thus were not available. . . . It is not a good trial tactic to fail to interview a crucial eyewitness [when] . . . no transcripts of a former interview exist." This argument is without merit. Trial counsel testified at the evidentiary hearing that, to the best of his recollection, his file contained transcripts of interviews as well as summaries of the boys' statements prepared by former counsel's investigator. Although de la Cruz maintains no such transcript exists, he cites nothing to support this proposition. Indeed, the record suggests otherwise.

¶22 At trial, before the first child testified, the parties stipulated that the state could use the transcript of a taped interview with the boy for impeachment purposes because the tape itself had not been received from de la Cruz's former counsel. In addition, de la Cruz's former counsel testified at the evidentiary hearing that he had not personally tape-recorded

an interview with either of the boys but could not remember whether his investigator had taken a taped statement of the first boy they had met or had prepared a summary report. Although former counsel could not, at the evidentiary hearing, clearly recall the second child witness,[3] he had filed an affidavit in support of de la Cruz's petition for post-conviction relief averring that his investigator had also interviewed the second child.

¶23 This evidence in the record corroborates trial counsel's testimony that he had received transcripts or summaries of the boys' statements and had determined, as a tactical matter, that multiple interviews of the children would not be in his client's best interest. The trial court did not abuse its discretion in finding this tactical decision did not constitute ineffective assistance of counsel.

¶24 Similarly, de la Cruz fails to support his assertion that trial counsel had "made no effort" to call the child witnesses at trial and that the witnesses "only appeared because the Prosecutor's investigator brought them in." The court made the following findings on this claim:

> With respect to the issue of the minor witnesses, . . . [they] did come to trial and did testify, and it was up to the jury to decide who to believe and what credibility to give all of the witnesses in this case. . . . [M]y recollection is [that] on Day Two of the jury trial, [defense counsel] made the Court aware right at the beginning of the trial proceedings that the witnesses were not available. [He] [a]dvised the Court about the investigator's attempts to locate the witnesses and have them come to trial, and the Court then gave him additional time to go out and get the witnesses.

[3]De la Cruz's former counsel stated at the evidentiary hearing that "there was another child, but I think he was not available."

> Clearly, it was obviously in the Court's view important to have them here if they could be here. But [defense counsel] made a record on the efforts he had made to locate those witnesses and bring them to trial, and in fact that did occur. Even if it were the case that the assistance of the State was called upon to help in that, that doesn't reflect on [defense counsel's] efforts. And I, frankly, don't remember whether that happened or not.[4] But the fact is the children were here and they did testify, and they were here as a result primarily of defense— the defense's efforts to identify them and notify them they had to be here, subpoena[] them, and get them here.
>
> So that's my recollection of what happened, and the fact that they were here eliminates any prejudice. They came, they testified, they were examined, cross-examined, and the jury made its decision about . . . credibility.

¶25 On review, de la Cruz's only allegation of prejudice with respect to the child witnesses is that, "[h]ad defense counsel spent time with these two juvenile witnesses, he would have been able to hear their eyewitness reports of the incident[,] . . . would have realized that the map drawn by [the officer] was wrong, and confusing to the children, and . . . would have immediately rehabilitated his witnesses." As addressed above, reasonable evidence supports the conclusion that counsel was aware of the substance of the children's prior statements, and the trial court did not abuse its discretion in concluding that de la Cruz was not prejudiced by counsel's failure to immediately correct the officer's erroneous cartography. *See* ¶¶ 18, 21, *supra*. De la Cruz has thus failed to establish that any prejudice

[4]The trial transcript is somewhat confusing on this point as it seems to suggest the state's investigator participated in locating these defense witnesses. Although we suspect an error of attribution in the transcript, we need not resolve that issue because, like the trial court, we find the record clearly reflects the successful efforts by the defense to make these witnesses available.

resulted from counsel's approach to these young witnesses, either before or during their testimony at trial.

Conclusion

¶26 De la Cruz has failed to establish that the trial court abused its discretion in denying his post-conviction claim of ineffective assistance of counsel. Although we grant the petition for review, we deny relief.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge